

LAW, LANGUAGE AND MORALS

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THERE is an essential connection between law, language and morals. It becomes evident when one notes what law and morals have in common and considers the language of specific moral and legal theories.

Both law and morals are normative subjects. They deal with value terms as well as with language that refer to some nonnormatively described "is." In law, the "is" appears as "the facts of the case," whereas the normative factor exhibits itself in such words as "innocent," "guilty," "delict," "right," "liability," "obligation" and "murder." In personal morality, religion, art and literature "realism" purports merely to exhibit or describe what is, but with a tension of conscience that combines the "ought" and the "is," adding evaluative terms such as "good," "bad," "sin," "virtue," "ought," "beautiful," "ugly," "selfish," "self-sacrificingly God-committed" or "aesthetically sensitive or insensitive."

But there is more than similarity between law, morals and the humanities generally. Implicit in any legal system, or theory defining the interpretation of the words in its positive cases and rules, are personal moral and also epistemological assumptions. Conversely, there is no epistemological philosophy of the source of the meaning of language, or personal moral theory, that does not entail specific legal consequences with respect to a judge's decision in at least some concrete cases. Note, for example, the relation between the late Judge Learned Hand's positivistic moral and linguistic philosophy and his legal interpretation of the American Bill of Rights. Modern alternatives to Anglo-American legal positivism provide additional illustrations. The world's legal systems, antecedent to the creation of Western legal science, which Sir Henry Maine referred to as "Status," provide a further example.

JUDGE LEARNED HAND'S INTERPRETATION OF THE BILL OF RIGHTS

After indicating that Justice Holmes' "understanding of the meaning of law [was] strictly Austinian," i.e., positivistic, Judge Hand added that for Holmes "morals . . . depend upon preferences, arbitrary and imperative."¹ This amounts to the assertion that the positivistic Austinian theory of law, which Judge Hand accepts, rests on an assumption about personal morality. Hence his legal theory is also a moral theory. Stated with analytic precision, its moral premise (IM) is:

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1. HAND, *THE SPIRIT OF LIBERTY* 58 (2d ed. 1953).

- (1M) For any person *p* and for any object of personal moral judgment *x*, to say that *x* is good as judged by *p* is equivalent to saying that *x* is preferred by *p*.

In the case of the English jurist Austin, from whom Justice Holmes and Judge Learned Hand derived their legal positivism, this premise took on a formally equivalent, but hedonistic content. This occurs in Austin's *The Province of Jurisprudence Determined* where he writes that of all previous thinkers, the one whose legal philosophy is nearest to his own is John Locke of the *Essay Concerning Human Understanding* when the latter identifies the meanings of the words "good or evil" with "pleasure or pain."²

This connection between (1) the personal moral premise of Austin, Holmes and Judge Hand's positivistic theory of law and (2) Locke's *Essay* is important because the latter classic is primarily an epistemological treatise. This means that Austin, Holmes and Judge Hand's positivistic conception of law is a linguistic as well as a moral philosophy, since epistemology is the science that investigates the nature and source of the meaning of words. Locke's epistemological thesis is that all meaningful words in any subject whatever are radically empirical in character. In short, any meaningful word refers directly or indirectly to sense data as the source of its entire meaning. Expressed with analytic clarity, this epistemological assumption (IEp)^{RE}, where the superscript RE stands for the radical empirical theory of the meaning of all words, is:

- (IEp)^{RE} For any person *p* and for any concept *c* in any subject whatever, to say that *c* is a meaningful word is equivalent to affirming that *c* refers for its entire meaning to a datum given directly through the senses or is definable in terms of such data.

Another name for this epistemological theory of language is "positivism." It is precisely because the legal theory of Judge Hand, Thayer, Austin and the John Locke of the *Essay* rests on this epistemological premise that it is called "legal positivism."

From this positivistic assumption (IEp)^{RE} concerning the source of the meaning of all language, it follows that if the normative words of personal morality or positive law are to be meaningful, their meanings must be identified with radically empirical data such as privately sensed pleasure and pain after the manner of Austin, Bentham and Locke's *Essay*, or personal approvals or disapprovals after the manner of Hume, or private "preferences, arbitray and imperative" as in the case of Holmes as described and accepted by Judge Hand. In fact, unless this premise of Locke's *Essay* is assumed, both the theory of personal morality of Hume, Bentham, Austin, Holmes and Hand and their conception of law fail to be required and lose their initial plausibility.

Conversely, the two foregoing humanistic assumptions, (IEp)^{RE} and (1M), concerning (a) the source of the entire meaning of all words and (b) the meaning of the words of personal morality in particular, entail a specific theory of the way in which legal language is to be interpreted by the judge in

2. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 166 (1954).

any legal system. This becomes evident when the legal premise of Judge Hand's positivistic theory of law is specified.

It is to be emphasized that Judge Hand's moral premise (1M) defines only the good or just in relation to a particular person. In any official legal judgment, however, the judge speaks not for his own private pleasure, approval or preference, but for those of the community as expressed through official procedures of the legal system as a whole. Hence, it is a consequence of the positivistic theory of the meaning of moral words that the legally just and the personally good or just are two quite different things. As Judge Hand has emphasized in his article on his colleague Judge Thomas Swan, a positivistic judge must keep from his legal judgment his personal moral judgment of what is just.³ The question arises, therefore, concerning what legally just, as distinct from personally good or just, means for any radically empirical legal positivist. The answer to this question lies in their legal postulate.

One of the first linguistic and moral positivists to see this problem and to suggest the direction which its answer must take was Hume. This occurred in his *Treatise* where, after positivistically identifying the meaning of "personally good as judged by p" with "approved by p," he points out that, whereas personally good is a "natural" concept, justice (in the sense of publicly or officially just) is "artificial."⁴ By this, I take it, Hume meant two things: First, the meaning of the expression "personally good or just" is natural because it refers to something given empirically. Second, since justice refers to the "objectively good" and "the officially just" in the sense of being the same and prescriptive for everyone in the legal system, and since radical empirical natural knowledge gives only a good or just relative to the particular perceiver, it follows that legal justice is not a natural datum of human experience and must depend on some artificially introduced convention. Hence, the doctrine of natural law is valid for morals but meaningless in legal science.

As Hume and Bentham noted, the least artificial convention for any legal system seems to be the following:

(1L)^{BE} For any person p and for any object of official legal judgment x, to say that x is objectively good or legally just is equivalent to saying that x is approved or preferred by or pleasing to the majority of p.

It is to be noted that this, the legal postulate of legal positivism, expresses both its epistemology and its personal morality, thereby exhibiting its theory of the relation between language, morals and law. The connection between law and language is revealed in the assumption that "legally just" must be defined in terms of empirically known data; otherwise, this theory of law would not be positivistic. The essential connection between the positivists' law and their morals is revealed in the legal postulate (1L)^{BE}, which defines the legally just

3. Hand, *Thomas Walter Swan*, 57 YALE L.J. 167 (1947); HAND, *op. cit. supra* note 1, at 209-19.

4. 2 HUME, A TREATISE OF HUMAN NATURE 257-58 (1886).

in terms of private preferences, approvals or pleasures together with the quantitative notion of the majority of people.

Several implications of this theory of law have not received the attention they deserve. First, legal justice, as distinct from private morals, is made a mere question of numbers. From this it follows that should there be nothing concerning some particular legal dispute between two people about which the majority of people in the legal system agree in their approval or disapproval, the concept of what is legally just with respect to this dispute is meaningless. Second, the Anglo-American judge's use of past precedents to arrive at a legal decision of which the majority of people today disapprove should not exist. Third, the traditional American legal practice of declaring majority-approved legislative statutes illegal if their substantive content is incompatible with the right of a single dissenter to a religious or political belief that affronts the legislative and popular majority also becomes meaningless. Certainly, if to say that "x is legally just" is equivalent to saying that "x is approved by the majority," then, as the legal positivists Hobbes and Austin saw, to talk about a majority-approved statute being illegal is to affirm a contradiction. It is a tribute to the integrity of Judge Hand, if not to the adequacy of his positivistic linguistic, moral and legal philosophy, that he accepted this consequence of positivism in law, language and morals. In his article on "Chief Justice Stone's Concept of the Judicial Function," Judge Hand tells us that the Bill of Rights is to be interpreted not as law, but merely as morals or "admonitions to forbearance"⁵ to the legislators and the electorate which, if they do not follow, "a judge of integrity" (a judge holding Judge Hand's positivistic legal philosophy) can do nothing to redress.

A fourth consequence is that even if the majority agree on what they approve, prefer or find pleasing, this theory of law leaves meaningless the obligation of everyone else in the legal system to be judged by what the majority approve. In short, this conception of law cannot resolve what the writer elsewhere has called the "problem of legal induction,"⁶ the problem of passing from approved by the majority to obligatory for everyone in the legal system. Just as Judge Hand has noted, quite correctly, that "x is morally good," *i.e.*, "preferred by me" is quite a different thing from "x is legally just," *i.e.*, "preferred by the majority of people in the legal system," so the latter is different from and cannot give meaning to "x is legally obligatory for everyone in the legal system." Austin's attempt, in his classic definition of law, to meet this difficulty, by appeal to the materialistic club of Hobbes' political sovereign, will not do for three reasons: First, Hobbes' physical club is that of a natural law materialistically metaphysical theory, and, as shown above, for any moral and legal radically empirical positivist, a naturalistic, *i.e.*, an empirical, theory of the meaning of normative words exists in morals and is meaningless for law, as any metaphysics, be it materialistic or spiritual, is similarly meaningless.

5. HAND, *op. cit. supra* note 1, at 204.

6. NORTHROP, *THE COMPLEXITY OF LEGAL AND ETHICAL EXPERIENCE* ch. 22 (1959).

Second, the club of the political sovereign, which is capable of bringing pain or evil to bear on anyone who disapproves of what the majority approve, must be, as it was for Hobbes, a naturalistic public object in the space and time of physical science, which is bigger than the similar clubs of anyone else in the community. But such a public object, to be meaningful, requires a realistic theory of the meaning of words, as again Hobbes well knew, and the realistic theory is not warranted by the epistemological premise (IEp)^{BE} above of Locke's *Essay* and the moral or legal positivist's linguistic theory. Third, as the radical empirical and positivistic Hume himself made clear, no "is," however big and painful it may be when applied, can give an "ought."⁷

Kant also saw this fatal weakness in British empirical legal positivism. The neo-Kantian lawyer Professor Hans Kelsen has emphasized it more recently.⁸ That Hume, Kant, Kelsen and the writer are correct on this point is confirmed by the fact that contemporary British lawyers, such as Professor H. L. A. Hart,⁹ brought up in British radical empirical philosophy and Austinian legal positivism now see that Austin and Hobbes were in error in their theory of legal obligation.

Notwithstanding its initial promise as a support for liberal democracy and its influence upon English law since Bentham and upon American law since Thayer, it appears that the days of the decisive influence of Judge Hand's theory of the relation between law, morals and language are numbered. Already in its spiritual home, England, Austin and Hobbes' legal positivism is a seriously maimed if not a dead dodo, since its legal assumption, (IL)^{BE} above, has been replaced, by the quite different positivistic theory of law of Kelsen. This shows in the writings of such English lawyers as Professors Granville Williams, Graham Hughes and H. L. A. Hart.

It does not follow, however, that an adequate theory of the relation between law, morals and language is to be found in the writings of these men. A reading of their works will show that they are still heavily under the influence of British radically empirical moral and linguistic theory and especially that recent version of it represented by I. A. Richards and the later Wittgenstein. In other words, they are still Austinian positivists so far as their theory of language and much of their theory of morals are concerned and have merely replaced the Austinian legal premise (IL)^{BE} above with that of Kelsen in order to make the concept of legal obligation meaningful. The result is a legal, moral and linguistic confusion instead of an adequate theory, as the following considerations show: (1) As was indicated in our determination above of the relation between morals, language and law in Judge Hand's legal theory, the Austinian positivist's legal postulate is required by (a) his radically empirical epistemological premise and (b) the moral postulate which it in turn entails. (2) Kelsen's legal positivism, because of its neo-Kantian epistemological as-

7. HUME, *op. cit. supra* note 4, at 245-46.

8. KELSEN, *GENERAL THEORY OF LAW AND STATE* (Wedberg trans., 1946).

9. AUSTIN, *op. cit. supra* note 2, at vii-xviii.

sumption concerning the meaning of words in any adequate scientific language, be it normative or nonnormative, requires, however, for its validity and meaningfulness a quite different theory of language from that of Locke's *Essay*, Hume, Bentham, Austin, I. A. Richards or the later, exceedingly nominalistic and contextually operational Wittgenstein. But for a follower of Locke, Hume, Richards, or Wittgenstein to affirm that any word has the meaning assigned to it by either a Kantian or a neo-Kantian theory of knowledge is to affirm "metaphysical nonsense." Hence, these British Kelsenian legal positivists do not explain how Kelsen's theory of legal obligation conforms with their Austinian and Wittgensteinian theory of the meaning of words and of morals. Nor can they explain without radically modifying their present theory of both morals and language. For what has to be realized is that in making the shift from Austinian to Kelsenian legal positivism it does not suffice to change merely the Austinian legal postulate (IL)^{RE} above; its moral and linguistic assumptions (IM) and (IEp)^{RE} must be changed also.

What direction must this change take? It will help to find the answer if we summarize the three major points at which the traditional Anglo-American legal positivism fails. First, its Austinian and Hobbesian concept of the sanction for positive law is false on two grounds: (a) its appeal to Hobbes' materialistic club rests upon a naive realistic theory of the meaning of language, and naive realism is incompatible with positivism, and (b) as Hume, the greatest of linguistic positivists showed, and Kant and Kelsen reconfirmed, no "is" however big and absolutely painful can give an "ought," be it a moral or a legal obligation. Second, Austinian legal positivism leaves meaningless the obligation of any and everyone in any legal system, rather than merely the majority who approve a particular positive legal rule, to be legally judged by the norms of the legal system. Third, it provides no legal meaning, though it does provide a moral meaning, for the right of a person to his own religious, political or nonnormative scientific belief when that belief is disapproved or not preferred by or not pleasing to the majority of the people and their officially elected representatives. This follows, let it be recalled, from the legal postulate (IL)^{RE} above. If "x is legally just" is equivalent to "x is what the majority approve," then it is self-contradictory to talk about anything that the majority approve being unjust.

Since our concern is with morals as well as law, it is important to note that this unfortunate consequence of Austinian legal positivism with respect to the *legal* protection of religious and political dissenters from what the majority disapprove, is a consequence of the positivist's theory of morals, quite apart from their legal postulate (IL)^{RE}. Such is the case because their moral premise (IM) locates the normative value of anything, not in the substantive content of the object x that is evaluated, but solely in the radically empirical, introspective psychological experience of the evaluator. As Hume wrote,

Take any action allow'd to be vicious: Wilful murder, for instance . . .
[t]he vice entirely escapes you, as long as you consider the object. You

never can find it, till you turn your reflection into your own breast. . . . It lies in yourself, not in the object.¹⁰

Forthwith, it becomes meaningless for the moral value of anything to turn on its substantive content, if, as occurs in judicial review, a majority-approved legislative statute is judged with respect to the legality of its substantive content. This is why Judge Learned Hand is correct when he sees that a consistent Austinian legal positivist, what he calls a "judge of integrity," must interpret the language of the Bill of Rights as moral exhortation rather than as law. This also is what Judge Hand means when he adds, in the aforementioned article on Mr. Justice Stone, that there is no difference in this respect between majority-approved statutes affecting personal rights and those involving property rights or New Deal social legislation. If the meaning of morals as well as of law is not in the substantive content of what is judged but in "your own breast," this is true. Certainly, if "x is good" or "x is just" is equivalent to "x being approved," then approval is justice and what is approved is irrelevant. Clearly, Hume's conception of morals has legal implications which Judge Hand expresses in his theory of judicial review and in his interpretation of the language of the Bill of Rights in the American legal system.

SOME RECENT ALTERNATIVES TO TRADITIONAL ANGLO-AMERICAN MORAL AND LEGAL POSITIVISM

It is generally accepted by the majority of contemporary analytic philosophers and British lawyers, such as those mentioned above, that the identification of the meaning of the normative words "good" and "bad" in personal morals with the radically empirical data of introspective psychology, such as the "pleasure" and "pain" of Locke, Bentham and Austin, Hume's "approvals" or Judge Hand's "arbitrary preferences" commits what the late Professor G. E. Moore called "the naturalistic fallacy."¹¹ The gist of this fallacy consists in pointing out that such a theory entails that the propositions "pleasure is good," "my preference is good" or "what I approve is good" are equivalent to the trivial tautologies "pleasure is pleasure," "my preference is my preference" or "what I approve is what I approve"; whereas, clearly, when one predicates the word "good" of anything, one is affirming something more than such a trivial tautology. In short, sentences in which any normative word is predicated of any empirical fact are clearly synthetic, *i.e.*, the predicate term means more than the subject term. Since the moral and legal theory of Hume, Bentham, Austin, Hobbes, Holmes and Judge Hand has the consequence of making such sentences analytic, their theory is false.

Moore's own theory of personal morality throws additional light on the relation between law and language. Due to his realistic theory of the meaning of words, he asserted that there are objects of human knowledge which are the

10. HUME, *op. cit. supra* note 4, at 245.

11. MOORE, *PRINCIPIA ETHICA* (1922).

same for all knowers and which, therefore, are not relative to particular percipients and evaluators after the manner of all items of knowledge in a radically empirical epistemology. This theory made it meaningful for Moore to interpret the meaning of the word "good" in personal morals as referring to a nonempirical, realistic, ethical property which is the same for all knowers and incapable of further analysis. The reason why it is both nonempirical and unanalyzable into empirical factors such as pleasure, or approval or preference is that, otherwise, the naturalistic fallacy occurs.

Essential to Moore's theory is his distinction between "intrinsically good" and "instrumentally good." A "good" is intrinsic when its goodness depends on nothing other than itself. A "good" is instrumental if its goodness depends on its efficacy in achieving intrinsic goodness. Only intrinsic goodness is non-empirical and not further analyzable. Since this means that it is known immediately or intuitively, this theory has been called the "intuitive theory" of morals. Expressed with analytic precision, this theory (IM)^I, where the superscript I means the intuitive theory, therefore, is:

(IM)^I For any person *p* and for any object or moral judgment *x*, to say that *x* is intrinsically good is equivalent to saying that *x* is characterized by a nonempirical, unanalyzable ethical predicate Φ where Φ is a realistic epistemological property the same for all knowers.

This entails the consequence that all normative subjects, and hence law as well as morals, contain at least one basic concept which is autonomous and which, therefore, does not define away, after the manner of Austinian legal positivism, sociological jurisprudence and some American legal realists, in terms of the empirical data of any empirical science.

The words "realistic epistemological property" in moral assumption (IM)^I express the fact that just as the Austinian legal positivist's theory of what the word "good" means requires a radical empirical theory of the meaning of language for its justification, so Moore's theory of morals assumes a realistic epistemological theory of the meaning of both descriptive and intrinsic evaluative language. The difference between these two theories of the meaning of any word is, therefore, important.

Realism is the linguistic theory that words do not require the particular observer or evaluator to be specified, for any descriptive or evaluative statement to be meaningful. This is why in (IM)^I the phrase "as judged by a particular *p*" does not appear. In descriptive common-sense judgments or natural science, realism means that we know objects and laws invariant or the same for all observers or physical frames of reference, which exist independently of any particular perceiver being present. By way of contrast, radical empiricism entails the thesis, as Galilei, Newton, Bishop Berkeley and Hume showed, that it is meaningless to make either a descriptive or evaluative statement without specifying the particular perceiver or the evaluator for whom the statement is true. This is the point of Bishop Berkeley's famous state-

ment concerning descriptive statements that *esse est percipi* by a particular perceiver. This is why also in Judge Hand's moral postulate (1M)¹² above it is necessary to include the phrase "as judged by a particular p." Otherwise there would be no such thing as the defendant's behavior being "good," *i.e.*, approved, as evaluated by the defendant and "bad," *i.e.*, disapproved, as evaluated by the plaintiff.

The late Professor Felix Cohen, accepted Moore's moral theory and applied it to law. First he showed that all other normative words in both morals and law can be defined in terms of Moore's intrinsic goodness taken as a non-empirical, not further analyzable, primitive concept. Second, he noted that the tendency among some pragmatically minded American legal realists and many sociological jurists, such as Professors Pound, McDougal and Lasswell, to regard law as merely an instrument of social control, thereby making the meaning of all normative words "normatively ambiguous" and the meaning of all legal language dependent on a "policy decision," rests on two errors: The first is the failure to realize that science contains constitutively introduced concepts as well as instrumentally defined ones. The second is the failure to distinguish in morals and law between the intrinsically good and just and instrumental goodness and justice. This does not mean that the instrumental role of law is not very great or not prodigiously important. But its presence and importance arise from the fact that morals and law are not merely handmaids to some other subject, but contain one autonomous, intrinsic goal value of their own. Consequently, to be a properly trained lawyer or a judge of integrity is to be concerned with the intrinsically good and just as well as the instrumental.

Moreover, if, as G. E. Moore's theory entails, moral goodness is a realistic, primitive ethical predicate the same for all knowers, it follows that the intrinsically good as known by one person is identical with the intrinsically good as known by any other, however much their instrumental moral and legal concepts for realizing this intrinsic goodness in particular cultures, legal systems and circumstances may vary. Forthwith Judge Hand's and the legal positivists' necessity for distinguishing between the morally good, relative to the particular evaluator, and the officially and legally just evaporates. This permits one to identify the intrinsically just in law with the intrinsically good in morals. Then law and its justice become conceived, as they were by both Felix Cohen and his father, Morris Cohen, as the quest for the morally good life, where "good" means Moore's intrinsic moral goodness.

The lawyer's concept of the sanction for law then undergoes a sea-change. Instead of it being, as in Austin's famous definition of "laws, . . . properly so-called,"¹² the physical power of the sovereign to bring absolute pain or evil to bear on those who dissent from his commands, it is the intrinsic moral goal value of law which sanctions the policeman's use of his physical club. Thus, the policeman can be tried and condemned for murder if, in the use of his over-

12. AUSTIN, *op. cit.* *supra* note 2, at 13.

powering physical club, he violates the substantive content of the norms prescribing its use by the positive law. Hence, Sir Arthur Goodhart, the contemporary Regius Professor of Jurisprudence Emeritus of Oxford University, is correct when he writes: "It is because a rule is regarded as obligatory that a measure of coercion may be attached to it: it is not obligatory because there is coercion."¹³

Furthermore, if intrinsic legal justice is identical in meaning with intrinsic moral goodness for the particular individual, as is the case when "intrinsically good" has a realistic epistemological meaning the same for all knowers, then the fact that, in any legal system, its norms are obligatory for everyone in the system becomes meaningful. In short, legal induction presents no problem for anyone holding this intuitive theory of ethics and law. Therefore, when one interprets the meaning of intrinsic goodness after the manner of G. E. Moore, not merely morals but also law become altered accordingly.

Kant provided independent confirmation of a similar conclusion. In his *Critique of Pure Reason* he gave a philosophical analysis of the descriptive language of Newtonian mathematical physics and also of Western common sense. This analysis showed that both contain two different kinds of meaningful words. One kind is that noted in Locke's *Essay* and analytically designated above in the linguistic premise (IEp)^{BE} of Judge Hand's Austinian legal positivism. Kant called meaning given in this way "*a posteriori*." The writer calls concepts, the entire meaning of which is of this kind, "concepts by intuition,"¹⁴ where by "intuition" is meant the *direct* sensing or *immediate* experiencing of something *entirely* empirical. (G. E. Moore's intuitively known "good," being nonempirical, is not, therefore, a concept by intuition in the writer's sense of these words.)

The other type of meaning which Kant noted to be present in Newton's physics is theoretically introduced, being brought by the scientist or observer as knower to the observed *a posteriori* data. Kant called concepts, the entire meaning of which is of this kind, "*a priori*." The writer, in order to leave open the question whether they are (a) Kantian categorical, (b) neo-Kantian merely hypothetical or (c) logically realistic,¹⁵ indirectly and pragmatically tested, theoretical constructs, calls them "concepts by postulation that are concepts by intellection."¹⁶ The latter clause is added to express the fact that, being syntactically constructed, these concepts are imageless and hence nonempirical apart from their "epistemic correlations,"¹⁷ or "rules of correspondence"¹⁸ with a *a posteriori* data. In Kant's interpretation, (a) just above, gives his idealistic epistemological theory of descriptive knowledge. It also enabled him, and Kelsen after him, to find the meaning of normative words in the

13. GOODHART, *ENGLISH LAW AND THE MORAL LAW* 17 (1953).

14. NORTHROP, *THE LOGIC OF THE SCIENCES AND THE HUMANITIES* ch. 5 (1947).

15. NORTHROP, *PHILOSOPHICAL ANTHROPOLOGY AND PRACTICAL POLITICS* ch. 3 (1960).

16. NORTHROP, *THE LOGIC OF THE SCIENCES AND THE HUMANITIES* ch. 5 (1947).

17. *Id.*, ch. 7.

18. MARGENAU, *THE NATURE OF PHYSICAL REALITY* 60 (1950).

theoretically introduced constructs, thereby explaining why the radically empirical "is," which is the object of the normative judgment, can never give an "ought." Thus, Kant avoided the naturalistic fallacy, at least in the form in which it occurs in Locke's *Essay*, and in Hume, Bentham and Judge Hand's Austinian legal positivism.

As articulated by Kant, the result was his "categorical imperative" in morals and his formal theory of law. Immediately it no longer was a mystery why it is an inescapable fact of anyone's moral experience, as G. E. Moore showed by his "open question" argument,¹⁹ that the moral question whether one should do what is most pleasant or something else is a genuinely meaningful one as it cannot be if the meaning of the word "good" is identical with that of the word "pleasant."

Although the present account of the source and content of Kant's imageless scientific constructs is different from what he supposed, the fact that they exist and do not reduce to the concepts by intuition referring entirely to empirical data is now generally recognized by physicists and philosophers of physics such as Einstein, Professor Henry Margenau, Ernest Nagel, the writer and even today's logical positivists.²⁰ The logical positivists' acceptance of the irreducibility of concepts by postulation to concepts by intuition is especially convincing, because in their initial radically empirical period of Rudolf Carnap's *Der Logische Aufbau Der Welt* and their middle naive realistic period of von Neurath's "physicalism" they gave the very strong impression they believed the contrary.

The remarkable thing about Kant's theory of morals and law is that it used the concept of law to define even the personally good. By contrast, in both Bentham's radically empirical, introspective, psychological theory and G. E. Moore's nonempirical, intuitive theory, the meaning of the moral word "good" is identified with an atomistic property. Being atomistic, it entailed nothing other than itself in one's own or any other person's moral experience. In short, the idea of law was not in it. This is why Bentham's atomistic "good" tended to make morals, economics, law and politics *laissez faire* and relative to the introspections of the private person. It is also why G. E. Moore, even when he arbitrarily assumed that his atomistic, nonempirical property, "good," is identical for all knowers, could provide no criterion for saying when it is true to predicate it of anything. Consequently, even if this good exists, it is morally and legally useless.

Applied to law, both of the atomistic theories of the meaning of normative words have another fatal weakness. As Hume noted, the senses do not give us the idea of law. They give at best only what is true for a very large *some*, never for *all* instances. Consequently, no atomistic theory of the meaning of normative words can account for the most evident thing about law, namely

19. MOORE, *op. cit. supra* note 11, at 43.

20. Martin, *On Semantical Rules and Definable Predicates*, 10 PHIL. STUDIES 33 (1959); MARGENAU, *op. cit. supra* note 18; EINSTEIN, *THE WORLD AS I SEE IT* (1934); Grünbaum, *The Duhemian Argument*, 27 PHIL. SCI. 75-87 (1960).

its lawfulness; only a theory which conceives of at least some of the words of its language as theoretically introduced constructs can do so. This Kant saw. The remarkable thing, however, is that he also saw that it is as true for personal morals as it is for law. This occurred in his "categorical imperative" which requires one to judge the goodness of one's conduct from the theoretically conceived standpoint of what it would look like were it a universal law of conduct practiced by everybody. That this is not the empty formula many critics, ignorant or unmindful of theoretical constructs in science, have tried to make it out to be, is shown by the following more concrete question which anyone must ask himself if he accepts this moral theory. This question is: Would I like it if what I now introspect to be the most pleasant thing to do to my neighbor John Brown were done by him to me? If the answer to this question is No, the categorical imperative requires me to conclude morally that however pleasing such conduct would be either for me or for the majority of people, such conduct is bad.

In order to see why the extension of the scientific language of constructs from the natural sciences to morals and law, which occurred in Kant's *Critique of Practical Reason* and his *Philosophy of Law*, leads to such a moral and legal theory, let us compare Kant's conception of these constructs in the natural sciences with the contemporary conception. For Kant, what distinguished "concepts by postulation" from "concepts by intuition" is that the former, unlike the latter, were characterized by *Allgemeinheit* (universality) and *Notwendigkeit* (necessity).

By *Notwendigkeit* he meant that the constructs which the scientist and also the person of common sense, as knower, theoretically introduce are necessities of his thinking; he has no choice but to think about the *a posteriori* data given through the senses in this way. At the time Kant reached this conclusion it was by no means absurd or unreasonable. His reading of Hume, he tells us, awoke him from his "dogmatic slumbers" by making him aware of the concepts by intuition to which our common-sense beliefs and Newton's physics would have to restrict themselves, if concepts by intuition were the only meaningful concepts that exist. Being an expert creative mathematical physicist who knew the technical meaning of the concepts in Newton's physics,²¹ Kant realized that its theoretical meaningful words and mathematical symbols were of a quite different kind. Since these theoretically introduced, meaningful concepts are not given to the scientist as knower through his senses nor definable in terms of such *a posteriori* concepts by intuition, Kant concluded that they must be brought as *necessities of the knower's thinking* to the data given through the senses, precisely in the manner in which today the logic built into a calculating machine is a necessity of its procedure in calculating with respect to the *a posteriori* information fed into the machine through its physical "sense" organs. We now know that this Kantian thesis that concepts by postu-

21. Northrop, *Natural Science and the Critical Philosophy of Kant*, THE HERITAGE OF KANT 39 (Whitney & Bowers ed. 1939).

lation are characterized by *Notwendigkeit* needs radical modification. Also the formal, substantive content of these constructs is, in the theory of relativity and quantum mechanics, quite different from what Kant supposed. Even so, the reference to calculating machines reminds us that human beings possess nervous systems and, as the late John von Neumann has pointed out,²² human nervous systems have a logic built into them which any human being brings to the *a posteriori* "information" given to him by his senses, as well as the possible hypothetic "logics" that may be "programmed in" by education or which the creative logician and pure mathematician may himself construct.

With respect to the *Allgemeinheit* of these theoretical constructs, Kant is still correct. As any theoretical physicist knows, the experimentally verified, mathematically constructed, imageless laws of mathematical physics are always characterized by being preceded by universally quantified entity variables. Applied to law, therefore, Kant's theory had no difficulty in solving the aforementioned problem of legal induction. This is the case because these theoretical constructs are what Earl Russell has called "incomplete symbols." This does not mean that their meaning is partial or ambiguous or in any way incomplete. What it means, instead, is that unlike the concepts by intuition of a radically empirical or a naive realistic theory of the meaning of all words, an "incomplete symbol" has no meaning if treated in isolation, apart from the imageless axioms or postulates in terms of which its *theoretical* meaning is constructed and *completely* specified. Since such axioms are what we mean by laws and such lawfully constructed entities have no meaning other than what their axioms assign to them, it follows that such laws hold for all instances of their entity variables. Hence, such constructs are characterized by *Allgemeinheit*.

When the discovery was made that there are other geometries than that of Euclid and hence that there is more than one "form of sensibility" space and that there are alternative "logics," it was revealed that the "categories" which Kant supposed to be *a priori* are merely hypothetical. Epistemic correlation of their respectively deduced consequences with *a posteriori* data is thus required to make the crucial experiments possible by means of which one operationally determines which of the hypothetical possibilities is the empirically confirmed one. The result of this discovery was neo-Kantianism. Applied to law, somewhat uncritically as the following will show, this gave the legal positivism of Kelsen.

As noted above, Kelsen's positivism differs fundamentally from that of Austin, Hobbes, Thayer and Judge Learned Hand. This difference is at least twofold: First, whereas Austinian legal positivism derives from the British empiricism of Locke's *Essay*, that of Kelsen is the product of Continental rationalism stemming from Descartes by way of Spinoza, Leibniz and Kant. Second, as with Kant, G. E. Moore, Morris and Felix Cohen and the contemporary British Kelsenian legal positivists, the "ought" and its imputations do not

22. VON NEUMANN, *THE COMPUTER AND THE BRAIN* (1958).

define away and cannot be derived from any merely empirical "is," be it that of Hobbes materialistic public club or the "preferences, arbitrary and imperative" of Holmes and Judge Hand.

Therefore, "ought-to-be-ness" is for Kelsen a primitive presupposition of any legal system. To hope to understand law by regarding it as merely an empirical science concerned with causal relations between nonnormatively described events is, consequently, to attempt the impossible. Hence Holmes' famous dictum, that by law he means nothing more than the modest prediction of what the judge will do, rests on the error of confusing (1) the nonnormative relation of causality with (2) the quite different normative relation of imputative "ought-to-be-ness" between (a) the positive legal rules of the particular legal system, (b) the judge *in his official capacity*, subject to the procedural and substantive restraints of these rules, and (c) the defendant being judged in a particular case. This is the point of Kelsen's classic paper, "Causality and Imputation."²³

Item (b) in this imputative relation is important. As Professor Alf Ross of the University of Copenhagen, who differs with Kelsen on other points, has noted, the extreme American legal realism of Gray and the Jerome Frank of *Law and the Modern Mind* committed the additional error of failing to distinguish between (i) what the judge does in his official capacity and (ii) the same thing done unofficially, *i.e.*, the same judgment of the same case made, let us say, by the judge over cocktails in his club.²⁴ Only what the judge does officially is law. But to make a judgment officially is not merely to make it *qua* its character as a nonnormatively described and perhaps causally predictable event, but to make it subject to the presupposed imputative ought-to-be-ness of the norms of the particular positive legal system of which one is a part, which ought-to-be-ness the judge explicitly accepts in his oath of office and which every youth implicitly accepts when he or she becomes of age to take on complete citizenship.

From this, Kelsen concludes that law is a science but not, even in part, a science referring to nonofficial and nonnormative empirical data. It is the science which has as its first premise, or *Grundnorm*, the lawful ought-to-be-ness which any legal system whatever presupposes, and has as its second premise the neo-Kantian hypothetical, theoretically introduced, substantive normative content of the "First Constitution" of the legal system in question. Law then is the science which presupposes this first premise, and empirically determines the substantive content of both the second premise and what subsequent official, positive, normative legislative statutes and judicial judgments have occurred within the authorizations given by the norms of the First Constitution. In short, as Professor Alf Ross has noted, law for Kelsen is the positive science of such *sollen* (*i.e.*, ought-to-be) sentences.

23. KELSEN, WHAT IS JUSTICE? 324-49 (1957). See also the author's review of WHAT IS JUSTICE? by Hans Kelsen, 44 VA. L. REV. 815 (1958).

24. See ROSS, TOWARDS A REALISTIC JURISPRUDENCE 70 (1946), for his example of the "engineer" as unofficial judge.

Because of the second premise, to say of any object of legal judgment that "x is just or unjust" is always to presuppose the particular legal system in which the judgment is made. Hence, as with Austinian legal positivism, it is self-contradictory and therefore meaningless to talk about the particular legal system as a whole being just or unjust. Professor H. L. A. Hart gives expression to this thesis when he analyzes A's right with respect to B in a particular legal document in terms of "There exists a legal system . . ."²⁵

It is in this sense of equating law with the empirical science of the positive law that it is correct to refer to both Kelsen's theory of law and that of Austin, Hobbes and Judge Hand as "legal positivism." Both theories are legally positivistic in the sense that law is conceived as nothing but the empirical science of the positive law and in the more concrete sense that to judge anything to be just is equivalent to affirming that it is in accord with the positive law. From this it follows that it is self-contradictory and hence meaningless to talk about the positive law itself being legally unjust.

Kelsen is not a legal positivist, however, in the linguistic or epistemological, as distinct from the positive legal, sense of the word "positivism." In other words, because of his neo-Kantianism and its constructs, he rejects the thesis of Austin and Hand, deriving from Locke's *Essay*, that the meaning of the moral word "good" or the legal expression "officially just" must be identified with, or defined in terms of, radically empirical data. The reason, let it be repeated, is twofold. First, the radical empiricist, Hume, as well as Kant, has made it clear that no "ought" can be derived from an empirical "is." Hence the idea of legal obligation must be taken as a primitive concept in positive legal science. Second, legal language contains constructs, *i.e.*, concepts by postulation as well as concepts by intuition.

This has the following effect upon the legal syllogism of the judge's judgment. Under the Austinian version of legal positivism, the judicial syllogism contains only three propositions.

First premise: the norms of the positive law are such and such.

Second premise: the facts of the case show the defendant's conduct to be incompatible with the first premise.

Conclusion: ergo, the defendant is guilty.

Kelsen noted, however, that if the normative words in the first premise identify with, or are defined in terms of, nonnormative words, as is the case with Austinianism, then the first premise refers only to a nonnormative "is." Since the second premise does the same, there is no "ought" word in either premise. Consequently, the obligation of the defendant to be judged by the norms of the positive law, which the conclusion assumes, does not follow since not even two "is" sentences can give an "ought" sentence. Kelsen realized, therefore, that two things must be accepted. First, the normative words of the first premise cannot be identified with, or defined in terms of, nonnormative "is" words. Second, a third premise—the norms of the positive law ought to be obeyed—

25. Hart, *Definition and Theory in Jurisprudence*, 70 L.Q. REV. 37-60 (1954).

must be added to the judicial syllogism since then and only then does the judge's judgment follow.

Even this assumes, however, as Kelsen clearly realized, that the ought-to-be-ness which any legal system presupposes is one that is universally prescriptive for everybody in the legal system. What is the ground for this assumption? It is at this point, as well as in his interpretation of the meaning of the first premise, that Kelsen's neo-Kantianism, with its theoretically introduced constructs, becomes essential to his legal positivism because, as shown above, such constructs are characterized by universality. It follows that to be *any* legal person in the positive legal system in question means to be a person for whom its positive legal rules hold.

This way of solving the problem of legal induction is quite different from that of Felix Cohen. An examination of the difference will explain why the conceptions of the relation between law and morals of Kelsen and Cohen are so different also.

We have just noted that Kelsen's solution derives from Kant's observation that an adequate theory not merely of law, but also of morals, entails the idea of law, that is, the idea of the person judging himself in terms of a law which is the same for all persons. When his neo-Kantianism led Kelsen to regard ought-to-be-ness as merely a hypothetical maxim relative to the particular cultural and legal system, rather than a categorical imperative, then legal justice became relative also. This makes it meaningless to say that the positive law, for example, of the Hitlerian German legal system is less just than that of Adenauer's Germany even though the moral judgment of persons in both legal systems was and is to the contrary. Hence, for Kelsen and Professor H. L. A. Hart, as well as for Judge Hand's Austinian legal positivism, morals and law are two different things.

Felix Cohen, it will be recalled, solved the problem of legal induction as follows: First, appealing to G. E. Moore's distinction between intrinsic and instrumental values, he drew the distinction in law between instrumental and intrinsic legal justice. Second, he defined intrinsic legal justice in terms of moral goodness, where "goodness" means G. E. Moore's nonempirical, and not further analyzable, ethical property. Because Moore's realistic theory of the meaning of words entails that "good" is the same for all knowers anywhere, it followed that Cohen's definition of *intrinsic* legal justice (the goal of any legal system as distinct from its instrumental legal concepts) in terms of Moore's moral property "good" entails a meaning for the intrinsic, or goal value, part of law which is the same for all persons and therefore meaningfully prescriptive, not merely for everyone in the legal system, but anyone anywhere. This made it meaningful to judge legally the substantive normative content of one's own, or any other, legal system's positive law.

Furthermore, when Felix Cohen identified intrinsic legal justice, which the judge must use as his first premise in interpreting the legality of any legal language in deciding any case, with Moore's intrinsic, personal moral good-

ness, the same for anyone anywhere, the standards of measurement for the judge's personal moral judgment and his official legal judgment become identical. Cohen concluded, therefore, that a careful analysis of what the words "law" and "morals" mean shows that the legally positivistic judge does not merely err when he conceives of himself as a schizophrenic moral Mr. Hyde and a legal Mr. Jekyll, but also, like schizophrenics generally, he deludes himself when he thinks that he does so. What actually happened with either the Austinian or Kelsenian judge, Cohen believed, was that inevitably, because of the normative ambiguities of positive legal language, he more or less unconsciously and surreptitiously slipped in outmoded and uncritically examined personal moral judgments in the name of merely declaring the positive law.

Nevertheless, Felix Cohen's own legal theory gives us reasons for doubting that this intuitive theory of law and morals and its method of solving the problem of legal induction is the correct one. This becomes evident when one notes (1) what he says about the moral dangers in Moore's intuitive theory of the meaning of the word "good" and (2) the restrictions which he placed upon Moore's theory in order to avoid these dangers.

The danger in any intuitive theory of morals or law is that when one's normative judgment becomes thus freed from any further empirical test or theoretical analysis, bigotry and the spirit of the inquisitor is likely to arise. To prevent this, Cohen required that, before the word "good" is predicated of any object of moral or legal judgment, the resulting proposition be subjected to the test of Bentham's hedonistic principle—"the greatest pleasure of the greatest number of people." But Cohen avoided the naturalistic fallacy only by recommending it again, since Bentham's theory is the thesis that the meaning of the word "good" is identical with the meaning of the word "pleasure." The second defect in any theory of law that is based on Moore's way of avoiding the naturalistic fallacy is that it fails to achieve what Moore intended it to achieve, namely, to keep the normative sentences of morals and law cognitive; that is, sentences of which it is meaningful to say that they are true or false. If, as the naturalistic fallacy shows, normative assertions are synthetic statements, then isn't it the case that the test of their truth or falsity must be empirical? But Moore's theory of the meaning of the word "good" is that it refers to nothing empirical. Consequently, the test cannot be empirical.

The only escape would seem to be that any meaningfully true sentence with the word "good" as its predicate is known to be true because the sentence is a synthetic *a priori* proposition. But this requires Kant's categorically *a priori* idealistic epistemology and theory of language for its validity, whereas Moore's theory of knowledge, as we have noted, was naive realistic. Moreover, Felix Cohen, so far as the writer has been able to discover, did not believe there were any synthetic *a priori* propositions in either the normative or the natural sciences. Otherwise there would be no need to appeal to Bentham's hedonism to determine whether it was cognitively warrantable to predicate the word "good" of anything.

The third defect in Moore's way of avoiding the naturalistic fallacy is that, were his nonempirical intuitive theory of the meaning of the word "good" correct, which in his realistic interpretation of its meaning makes "good" the same for all persons, it is difficult to understand the evident fact that one person affirms an object of moral judgment to be good whereas another person affirms that same object to be bad. If the meaning of the word "good" is identical for both and if it is a realistic predicate of the object, then such predications by different people should not occur. We conclude, therefore, that this nonempirical intuitive theory of the meaning of normative words in both morals and law leaves meaningless the truth and falsity of legal and ethical judgments and hence fails to achieve the purpose for which it was introduced.

It is hardly surprising, therefore, that the principle effect of G. E. Moore's demonstration that a fallacy occurs if the meaning of any normative word is identified with, or defined in terms of, any empirical fact has been to convince many contemporary philosophical analysts that he is correct in using the naturalistic fallacy to demonstrate that sentences of moral and legal language are synthetic but errs in his assumption that such synthetic sentences are true or false. Instead, the nonanalytic meanings of the predicate terms "good" and "legally just" are "emotive," "hortatory," "ejaculatory" or "persuasive." This theory of law and morals we shall call "normative noncognitivism." Its very able representatives are the English and American analytic philosophers A. J. Ayer and Charles L. Stevenson in morals and value theory generally and Alf Ross in law.²⁶

But if Ross is a legal noncognitivist, why does he agree with Kelsen on the point noted above with respect to the *sollen* (ought-to-be) sentences of positive law? The answer appears to be that this is but part of Ross's position. Whereas Kelsen thinks that law is nothing but the positive science of such *sollen* sentences in a particular legal system, Ross recognizes also the unofficial *sein* (nonnormative "is"). Because of the normative ambiguities in official legal language and because it is analyzed by and applied to people who are not perfect official "ought-to-be's," the all-too-human, unofficial *sein* factor plays an important role in law, and it is the great merit of the American legal realists to have seen this. Their only error occurred when some of them went to the opposite extreme from Kelsen, by attempting to make law nothing but the empirical science of the unofficial nonnormative "is." When the late Karl Llewellyn,²⁷ the pioneer in American legal realism, told us that his early emphasis upon the study of what judges actually do in fact, as well as the official reasons they give for what they do, never entailed the rejection of the equal importance of the "ought" of the official positive law, his version of American legal realism may well be very close to that of Professor Ross. In any event,

26. AYER, LANGUAGE, TRUTH AND LOGIC (1948); STEVENSON, ETHICS AND LANGUAGE (1944); ROSS, *op. cit. supra* note 24; ROSS, *On the Logical Nature of Propositions of Value*, 11 THEORIA 172-210; ROSS, ON LAW AND JUSTICE (1959).

27. LLEWELLYN, THE BRAMBLE BUSH (1930); LLEWELLYN & HOEBEL, THE CHEYENNE WAY (1941).

Ross's position is that an adequate theory of law must pay attention to its unofficial *sein* as well as to its official *sollen* part and hence must combine American legal realism with Kelsen's legal positivism.

He notes, however, that this is by no means easy. Kelsen's theory conceives of law as the science of official, normative *sollen* sentences. Extreme legal realism is the thesis that law is the science of unofficial nonnormative *sein* sentences. The combination of any two sciences is a science. Consequently, the combination of the American legal realists' science of *sein* sentences with Kelsen's science of *sollen* sentences must produce a legal science that is conceived of as the science of *sein-sollen* sentences. The result, however, as Ross shows, is not a science, but a theory of law that is self-contradictory.²⁸

The proof that this is the case can be summarized as follows: If any one of these *sein-sollen* sentences is a scientific sentence, then it must be meaningful both theoretically and operationally to say that it is true or false. But, as we have shown above, such a sentence is synthetic—its normative *sollen* predicate meaning something other than its *sein* subject term. Thus the test of its truth must be either (a) empirical or (b) it is true *a priori*. Both the American legal realists and Kelsen, however, deny the existence of synthetic propositions that are true *a priori*. Therefore, the test must be empirical. But if this is the case, then to say that the synthetic *sein-sollen* sentence is true is to say that it must conform to some directly observable or indirectly confirmable empirical fact. The result, in the case of *sein-sollen* sentences which are empirically true, is to populate the universe with self-contradictory, Pickwickian *faits normatifs*²⁹ (nonnormative-normative facts), *i.e.*, empirical facts which both are and are not what they are. For, if the empirical *fait normatif* is to confirm empirically the nonnormative American legal realistic *sein* portion of the *sein-sollen* sentence, it must be completely an unofficial nonnormative *sein* fact; whereas, if it is to confirm the Kelsenian official *sollen* portion of the sentence, it must not be this nonnormative *sein* fact, but what it ought to be. Hence, the Gurvitchian notion of *faits normatifs*, which is necessary to make the empirical test of these synthetic *sein-sollen* sentences meaningful, is a self-contradictory notion. Consequently, the theory of law which conceives it as the science which results from combining the American legal realists' science of *sein* sentences with Kelsen's science of *sollen* sentences is a self-contradictory legal theory also.

As examples of such or similar legal theories which require the explicit or implicit self-contradictory notion of *faits normatifs* to justify their theory that the synthetic *sein-sollen* sentences of morals and laws are meaningfully true or false, Alf Ross cites not merely Gurvitch but also the non-neo-Kantian followers of Kant. The Hegelian and Marxist identification of the historical "ought-to-be" with the inevitable "is," is another example. Among Americans, Professor Lon Fuller's empirical "is-ought" facts, which he will not allow Pro-

28. Ross, *op. cit. supra* note 24.

29. *Id.*, at 50-51.

fessor Ernest Nagel to analyze into a nonnormative "is" fact which is empirical and "ought" factor which must be separated from it if confusion is not to occur, would appear to be another example.³⁰

Nevertheless, Ross maintains that these moral philosophers and lawyers are the only ones among traditional theorists who see the two different factors in legal and moral experience for which any adequate theory must account. Their only error is their supposition that their own theory, with its explicit or implicit self-contradictory notion of *faits normatifs*, is this adequate theory. He concludes therefore that (1) the theory of law which combines American legal realism with Kelsenian legal positivism and conceives the resulting synthetic *sein-sollen* sentences to be meaningfully true or false, *i.e.*, cognitive scientific assertions, is a self-contradictory theory, and (2) nevertheless no theory of law is adequate unless it combines American legal realism with Kelsenian legal positivism.

But how are these two conclusions to be reconciled? Ross answers this question by pointing out that the contradiction of the *faits normatifs* version of the combination arises from assuming that its scientific *sein-sollen* sentences are meaningfully true or false. A non-self-contradictory combination of American legal realism and Kelsen's legal positivism is obtained, therefore, when one assumes that the normative *sollen* words in the synthetic *sein-sollen* sentences are hortatory, ejaculatory or persuasive rather than empirically cognitive in their meaning.³¹ Thus Ross's theory of law, which he extends to morals and to aesthetics also, is identical with the one arrived at by Professors Ayer and Stevenson.

That these noncognitivists are brilliant moral and legal theorists is evident. That they are correct on the following points is equally evident, as has been shown by the foregoing analysis of their own and other theories: (1) *Sein-sollen* sentences are synthetic. (2) To save the cognitive meaning of such synthetic sentences by thinking they refer to a *sein-sollen fait normatif* is a self-contradictory notion.

Even so, two things are the case: First, for all its merits, this noncognitive theory, when taken seriously in law or pursued to its logical consequences in either morals or law, has fatal defects. Second, there is an alternative theory of the combination of American legal realism with Kelsen's legal positivism which avoids the contradiction involved in the notion of *fait normatif* while also having the merit of keeping moral and legal *sein-sollen* sentences cognitive. This theory is that the empirical fact to which the *sein* subject term of the synthetic *sein-sollen* sentence refers for its cognitive empirical meaning is

30. Fuller, *Human Purpose and Natural Law*, 3 NATURAL L.F. 68-76 (1958); Nagel, *On the Fusion of Fact and Value*, 3 NATURAL L.F. 77-81 (1958); Fuller, *A Rejoinder to Professor Nagel*, 3 NATURAL L.F. 82-104 (1958); Nagel, *Fact, Value, and Human Purpose*, 4 NATURAL L.F. 26-43 (1959).

31. Ross, *op. cit. supra* note 24; Ross, *On the Logical Nature of Propositions of Value*, *supra* note 26.

a different empirical fact from the empirical facts to which the *sollen* words of the synthetic sentence refer for their empirical cognitive meaning. Elsewhere I have called the class of empirical facts to which the *sein* term refers, "second-order facts," and the class of empirical facts to which the *sollen* words refer, "first-order facts."³²

The demonstration of the fatal weakness in any cognitive moral and legal theory is too technical and lengthy an undertaking to pursue here. Hence we shall restrict ourselves to clarifying and indicating the reasons for our alternative theory. To this end, two things are important: (1) The theory of morals and law which Sir Henry Maine called "law of Status." (2) The quite different conception of morals and law which expressed itself in what Sir Henry has described as a "movement from Status to Contract."³³

The Law, Morals and Religion of a Status Society

In any society, regardless of the theory of morals, law and religion which most of its people profess and practice, the people over time fall into different classes, one of any two of which is regarded as enjoying a normatively higher position in society than the other. To avoid the prevalent error of some comparative lawyers and anthropologists of confusing status in this omnipresent generic sense with Status in Maine's specific sense of a law of Status morals, law and religion, we shall use the uncapitalized word to express the generic meaning and the capitalized word for his specific meaning. A morals, law and religion within this latter meaning "has for its units, not individuals, but groups of men united by the reality or the fiction of blood-relationship."³⁴

What this means concretely becomes evident when one notes that in such a community neither one's pleasures, approvals, preferences or assents, nor one's noncognitive ejaculations are relevant to one's moral, legal or religious rights and obligations. Instead, these rights, in at least a major part, are determined at birth by one's sex and family standing (*e.g.*, primogeniture) and by the race of one's ancestors in their relation to the tribe and race of the first families of the nation. Webster's dictionary gives expression to the fact that the morals and law of all nations were originally of this Status type when it lists the word "tribe" as the first equivalent of the word "nation."

If, in such a nation, the race or the color of skin of one's ancestors is not that of the first families, then castes exist and one cannot expect one's moral, legal, religious or educational rights or duties to be equal to those of one's neighbor of a different color of skin who is a blood descendant of the first families. Moreover, even with the children of the first families, if the society is completely patriarchal, only sons will receive an education and among them only the eldest sons will receive the best education. The reason is that in such a society the best goes to those carrying the greatest responsibilities and these

32. NORTHROP, *op. cit. supra* note 6, ch. 19.

33. MAINE, *ANCIENT LAW* 151 (1908).

34. *Id.* at 163.

are always the eldest sons in the patriarchal families and the eldest sons of the first families in the state since they have to administer its army, religion, government and law.

Consequently, to ask in such a society whether a person is a good person is equivalent to asking what his or her breeding is. Also, in any legal dispute, the judge merely declares for the most part what he finds when he has the genealogical tables of the disputants before him, or, apart from these tables, what he knows of their representative castes by their color of skin or caste marks. Usually, however, appeal to the judge is unnecessary, since the members of each race and caste know their respective "places," rights and duties and the customs of the Status living law by habit. When the system is purely matriarchal, the corresponding rights, privileges, duties and obligations go to the eldest daughters. Because there are many different possible permutations of matriarchal and patriarchal factors in a Status society, there are many varieties of such societies.

That the ancestors of all of us originally believed and practiced such a morals, law and religion can be confirmed by reading the Old Testament or Fustel de Coulanges' *Ancient City* and C. W. Westrup's more comprehensive and recent *Introduction to Early Roman Law*, which describes the Patria Potestas of The Patriarchal Joint Family in the ancient Roman world before Western legal science, in the sense of Sir Henry Maine's law of Contract, was discovered and partially articulated. An Asian example is the Hindu's Laws of Manu.³⁵ A 17th century English example is to be found in Sir Robert Filmer's *Patriarcha*.³⁶

Recently, the English historian, Mr. Peter Laslett, has shown that this book is not as absurd as it appears to be when approached only through Locke (as given in Book I of his classic *Of Civil Government*) instead of from the standpoint of the patriarchal, theocratic, Canterbury Christian regal and aristocratic customs of early 17th century England. Viewed in the latter context, *Patriarcha* is not merely a description of the morals, law, Christianity and politics of an era which had these customs, but also of what Sir Robert in fact did and was obligated to do in administering the law in the Assizes at Maidstone and advising and supporting both the Archbishop of Canterbury as the head of the Established Church of England and the Crown as the head of the State.

Mr. Laslett has shown also that it was members of Sir Robert's family, and others like it, who created the Virginia Company and whose sons (usually the younger ones) and daughters carried this conception and practice of morals, law and Christianity into Virginia, from where it spread throughout the Old South. Mr. Laslett's first-hand study of the parish records in Virginia revealed also that practically all the present well-known Virginian families, who, incidentally, still refer to themselves as the "F.F.V.'s," are literal blood descend-

35. 25 MÜLLER, THE SACRED BOOKS OF THE EAST, THE LAWS OF MANU (1886).

36. FILMER, PATRIARCHA AND OTHER POLITICAL WORKS 1-46 (1949).

ants of Sir Robert or his "cousins" who, like Sir Robert, were members of the gentry of Kent and Essex.³⁷

It is not necessary to point out that a quite different and incompatible morals and law of the law of Contract type came into the American Federal legal system through the influence of Southerners such as Jefferson, Madison and Washington and Northerners such as Franklin, the Adamses and Hamilton. It is likely that it is the conflict within the present Southerner between the law of Status Filmerian and the law of Contract Jeffersonian parts of himself which is the source of much of his irritation and even bitterness today with respect to the recent unanimous decisions of the Supreme Court of the United States in the desegregation cases—decisions which express the morals, law and religion of a law of Contract society.

We can best understand the reasons which led our ancient predecessors to believe in the morals, law and Judaic-Christianity of a law of Status community if we compare it with the legal philosophy of Judge Hand's Austinianism. The latter philosophy, we have noted, rests on radical empiricism with respect to the source of the meaning of all words and on radically empirical data of introspective psychology, such as pleasures, interests or approvals, with respect to the identification of the meaning of the words "good" and "bad" in personal morality. Thus, the legal positivist's concept of the person is that of the introspected flow-of-consciousness self of Hume and James, a purely private, moral and legal person in no way observable publicly. The moral and legal person in a law of Status legal community is the publicly sensed biological person. This means that the linguistic premise of a Status legal community is naive realism, the theory that the meaning of words refers to public objects and properties, the same for all knowers and that these public properties are sensed. In short, whereas the modern legal positivists identify the meaning of all normative words with the empirical data of introspective psychological science, the adherents of a Status law, morality and religion identify them with the naive realistic, publicly meaningful facts of natural history and biological science.

Clearly, there is no *a priori* reason for choosing one of these identifications rather than the other. Either theory is arbitrary. Moreover, both theories commit the naturalistic fallacy.

The Status theory has the advantage, however, of making the meaning of all moral and legal words objective. Consequently, the morally good and the legally just are identical, and neither is relative to the evaluator. Also, because all values are tied to one's race, religion is essentially connected with one's ancestors. In the family, the religious symbol is the fire of the family hearth. In the nation, it is the tribal fire. Consequently, in such a morality and law, God tends to be conceived provincially as a God primarily of one's own tribe and its race.

37. Laslett, *Sir Robert Filmer: The Man versus the Whig Myth*, 5 WILLIAM AND MARY Q. 523-46 (1948); *The Gentry of Kent in 1640*, 9 CAMBRIDGE HIST. J. 148-64 (1948).

This connection between Status law and literature is revealed in the ancient Greek tragedies. Aeschylus in his *Eumenides* has Apollo say: "The mother of what is called her child is not its parent, but only the nurse of the newly implanted germ. The begetter is the parent. She, a stranger, doth but preserve the little creature, except God shall blight its birth."³⁸ This statement affirms the norms of a patriarchal legal system and roots them in a theory of biological heredity. This genetic theory is that the inherited traits of the offspring are transmitted from generation to generation solely by the genes of the male line. Because of the identification of normative words with the facts of naive realistic biological science, it is then inferred that, since God made human beings this way, the obligation of the wife and daughters to accept the patriarchal authority of the male in family, church and state is absolute and the obligation of all to keep the patriarchal male line purely bred is equally a Divine duty and the Patriarch's Divine right.³⁹

Why do those of us who have come heavily under the influence of modern philosophical, moral and legal thinking no longer believe this theory? One reason is that we now know the biological theory upon which it rests to be false. The female as well as the male contributes to the inherited traits of the children. This shows that the meanings of the normative words are not *sui generis*; in the language of G. E. Moore, they are not primitive, unanalyzable, intuitively given meanings. This means that our value judgments concerning second-order facts of human conduct are a function of our cognitive theory of first-order empirical facts in the nonnormative empirical sciences. Another reason, just noted, is that the Status theory is incorrect for precisely the same reason that the theory of Hume, Austin, Hobbes and Judge Hand is in error; it commits the naturalistic fallacy of identifying the meaning of the words "morally good" and "legally just" with some arbitrarily chosen empirical fact. Historically, however, the reason why we regard the Status theory as absurdly nonsensical, and both immoral and unjust, is the evolution of Western law which Sir Henry Maine has described as the "movement from Status to Contract." In what did this shift consist?

He tells us that it began in Roman law and that it "has been distinguished by the gradual dissolution of family dependency, and the growth of individual obligation in its place. The Individual is steadily substituted for the Family, as the unit of which civil laws take account."⁴⁰ Very much more, however, is involved. Not only does the individual rather than the family, the tribe and the race become the legal person, but, in addition, he conceives of morals, law and even God in a novel way. Also, new technical legal concepts, such as *jus in rem*, are introduced. These concepts were made possible by the discovery and use in Greek mathematical physics of what above we called "constructs"

38. Verse 657 (Weir Smyth ed. 1926); see 3 WESTRUP, INTRODUCTION TO EARLY ROMAN LAW, PATRIA POTESTAS, 1 The Nascent Law 228 (1939).

39. For a recent literary example, see Boyd Smith's play about a very humble West Virginia family, *THE PATRIARCH* (1931).

40. MAINE, *op. cit. supra* note 33, at 149.

or "concepts by postulation" with their novel idea of the elementary individual scientific object as a universally quantified entity variable in an imageless, axiomatically constructed relation or universal law. Applied to the normative sciences, as it was by the Greek and Roman Stoic lawyers, this gave the Stoics' thesis that moral and legal man is "cosmopolitan" or "universal" man, *i.e.*, the universally quantified variable person, (p), where (p) means any one person substitutable for any other in a universally quantified, imageless legal relation between persons.

When this new legal concept of what one means by a legal and moral person passed through the minds of Jews like Philo and Judaic-Christians like Paul into the religious thinking of people, the idea of God underwent a corresponding shift from Status to cosmopolitan Contract which led to the conception of Him not so much as the provincial God of one's ancestors, one's tribe and one's race, but as the God of the Gentiles as well as of the Jews, of Negroes as well as of Sir Robert Filmer's patriarchal Englishmen and of the conquered tribes in the Roman Empire as well as the conquering Roman tribes. In short, the Divine Being became the God of all mankind, before Whom differences in sex, primogeniture, ancestry or the color of one's skin are religiously irrelevant. Need one wonder, therefore, that the first official Christian church is called the "Roman Catholic Church," where "Catholic," when literally understood and consistently practiced, means freely assenting "universal" or "cosmopolitan" human being, male or female, and "Roman" means the influence of secular Rome—that is Roman law on Judaic-Christianity? The interested reader will find some of the evidence for this thesis in the chapter called "The Stoic Strain in Christianity" in E. Vernon Arnold's *Roman Stoicism*.⁴¹

But let us return to the Greek and Stoic Roman lawyer's concept of the legal person as the universally quantified entity variable person, (p), in an imageless, theoretically constructed legal relation or law, and note the impact which it had on the legal conception of a particular person's right to a thing in the evolution of Roman law. The Roman lawyers, such as the Scaevolae and their successors, expressed the idea of the legal person as the universally quantified person in the phrase "against all the world." Early Roman law was, however, of the Status type. Hence, its concept of the person was the naive realistic, sensed person, or what, in the language of constructs, one would call "a material constant." Similarly, "a thing" meant a naively sensed thing, also a material constant. Consequently, a particular person's legal right to a thing had to mean his naive realistic possession of that thing. From this it followed that if a thief took the thing away from its possessor, there was no meaning to saying that the latter still had a legal right to that thing.

When, however, the shift was made to the legal language of constructs, the following was made possible and actually happened. First, rights became defined not as a relation between a person and a thing, but as a relation between persons. But if both persons in the legal relation are material constants, there

41. ARNOLD, *ROMAN STOICISM* 408-36 (1911).

would be meaning, if A purchased a thing from B, to saying that A had the legal right to the thing so far as B is concerned, but not with respect to anyone else. In short, A's right to the thing, if a thief C took the thing away from him, still remained meaningless. The conception of the legal person as the construct which is the universally quantified entity variable in an imageless legal relation removed this difficulty. A's right to the thing then became conceived as a legal relation between A and the universally quantified variable (p) with respect to that thing. In other words, A had a right to the thing "against all the world," even though the thief had taken the thing away from him. The result was the Roman legal construct *jus in rem*.

The evolution of the Roman legal conception of the will is similarly interesting. Sir Henry Maine has pointed out that in its earliest form if a person A wanted certain rights to go to another person B upon A's death, A had no alternative but to have the right go immediately to B upon A's execution of his will. In other words, the only legal language was that of unconditional indicative sentences. Diogenes Laertius gives us the well-nigh unbelievable report that the Greek Stoic Chrysippus wrote some one hundred treatises on the formal properties of hypothetical sentences. In his recent remarkable study of the mathematical physics of Chrysippus, Professor S. Sambursky of the Hebrew University in Jerusalem tells us that one of Chrysippus' most important contributions to Western mathematical physics was his study of the logic of disjunctively related theoretical constructs.⁴² With such a language of hypothetical and disjunctive legal constructs, the idea of a right passing to one or another person, only if a particular contingency occurs, can be easily expressed, as it was in the later Roman law of wills and testaments. In short, the legal construct called "contingent remainders" became a commonplace in Western legal science from that day to the present moment. That this is true for many other constructs as well and as true for Anglo-American common law as it is of the civil law nations has been shown by the comparative lawyer, Professor Lawson, in his book *The Rational Strength of English Law*.⁴³ This "rational strength" is the technical rigor and precision of meaning, the decrease in ambiguity, which is introduced into any science when concepts by postulation are substituted for concepts by intuition with the latter concepts present also in the radically empirical sense of their meaning as the epistemic correlates of the constructs. In this connection, the title of a book which is a classic in English law because it removed countless ambiguities, is especially interesting—I refer to Fearne's *Contingent Remainders*.⁴⁴

The foregoing considerations have considerable contemporary importance. First, they show that the very prevalent attempt of "ordinary language" philosophers and lawyers to obtain an adequate analysis of the meaning of moral and legal words by exhibiting particular sentences of ordinary language "para-

42. SAMBURSKY, *THE PHYSICAL WORLD OF THE GREEKS* (1956) ; SAMBURSKY, *PHYSICS OF THE STOICS* (1959).

43. LAWSON, *THE RATIONAL STRENGTH OF ENGLISH LAW* (1951).

44. FEARNE, *CONTINGENT REMAINDERS* (2d ed. 1773).

digmatically," as they are wont to say, is doomed to failure. The language of unordinary, theoretically introduced constructs is also required. Second, the foregoing considerations demonstrate that any theory of law and morals, such as Judge Hand's Austinian legal positivism, which rests on the assumption that any meaningful word in normative language is radically empirical in character and, therefore, a concept by intuition, cannot account for the constructs of English law.

In saying that the ordinary language philosophers, who echo G. E. Moore and the later Wittgenstein, are doomed to failure, I do not mean that they are not in part correct or important; they are merely not *all*-important, because there is also, in both the natural and the normative sciences, the nonordinary language of constructs or concepts by postulation which the earlier Wittgenstein in his *Tractatus* called "perfect language." However, ordinary language, to the extent that it is correct or important, cannot be taken as exhibiting its meaning unambiguously in a "paradigmatic" example. This is the case only if ordinary language is interpreted in the radically empirical, rather than in the naive realistic meaning which it has for most ordinary people. The reason why we reject the naive realistic interpretation of ordinary language is that, as shown elsewhere,⁴⁵ it is a self-contradictory, and hence a false, theory of the meaning of words. Our positive thesis, therefore, is that an adequate theory of the meaning of both nonnormative and normative language requires the concepts by postulation of the "perfect language" of the Wittgenstein of the *Tractatus* and "the ordinary language" interpreted completely in the radical empirical manner of the later Wittgenstein. In other words, as noted above, an adequate theory of morals and law requires the combination of a radically empirical (as distinct from a naive realistic law of Status) American legal realism with the legal constructs of Kelsen's legal positivism.

What is the meaning of the words intrinsically "good" or "bad" and intrinsically "just" or "unjust" in this theory?

The Cognitive Meaning of Is-Ought (Sein-Sollen) Sentences

It is generally agreed by all informed and competent contemporary philosophical and legal analysts that, although Moore's intuitive theory is not the correct one, the issue has been sharply focused by him and turns around how one escapes what he called the naturalistic fallacy.

This fallacy, let it be recalled, is that if one identifies the meaning of any normative word, in the sense of intrinsically, rather than merely instrumentally, good or just with any empirical fact whatever, the result is a sentence which is a trivial tautology and this clearly is not what the sentence means. Moore noted also that the commission of the naturalistic fallacy closes questions that are clearly meaningfully open questions in anyone's moral experience. For example, if "x is good for me" is equivalent to "x is the most pleasant thing for me to do," then the following, obviously meaningful ques-

45. NORTROP, *op. cit.* *supra* note 6, ch. 21.

tion of anybody's moral experience, becomes closed and, in this sense, meaningless: Should I, in the present situation, do what most pleases me and which most pleases the majority of people in the community, or should I do something else, namely what I can't help feeling I ought to do? This consequence of committing the naturalistic fallacy is usually referred to as Moore's "open question argument."

It is to be noted, however, that this conclusion must be qualified or otherwise it would be meaningful to ask of the astronomical planets in their courses whether their conduct is good or bad. Certainly it is nonsense to say of the planets that, instead of moving, as "the facts of the case" show, in an orbit which is an ellipse, they ought to move in a pattern which is a rectangle, doing a "squad's right" at each corner.

This consideration makes the following question also a cognitively meaningful one: Of what empirical nonnormative facts is it appropriate to affirm that what did occur ought not to have occurred? Clearly, it is the facts of human conduct. But this answer, though a necessary, is not a sufficient condition. Otherwise we would hold a person morally and the law would hold him legally responsible if his conduct were known by us or the court "beyond the possibility of a reasonable doubt" to be entirely the causal effect of a cancer in his brain and hence of a character such that his behavior was in no way subject to his voluntary control. Why is this the case?

Is it not because of the empirical fact that there is also human conduct which is in part, at least, the causal effect of propositionally held beliefs, freely assented to and for which, therefore, a person is morally and legally responsible? In other words, it is meaningless and nonsensical to talk about the conduct of planets, stones or doorknobs being good or bad, or of them behaving in a way in which they ought not to have done, because their conduct is not a causal effect of their freely-assented-to-propositional beliefs concerning what a planet, a stone or a doorknob is and what the other first-order facts of their natural environment are. In short, a planet is not a freely assenting, proposition-entertaining natural object, whereas a human being is.⁴⁶ This tells us both why it is a fallacy to identify the meaning of any normative word either with any empirical fact or to what its cognitive meaning refers.

The naturalistic fallacy is a fallacy because facts merely are, and it is as nonsensical to talk about them being good or bad as it is to talk about them being true or false, except in the case (and the exception is the heart of the matter) of those facts of human conduct which are in part at least the causal effect of freely-assented-to beliefs and commitments of the person indulging in the conduct.

What normative words refer to, as the source of their cognitive meaning, therefore, is freely-assented-to propositional beliefs. They are meaningfully predicated only of those empirical facts of human conduct which are in part

46. For the neurological and cybernetic reasons why this is the case, see NORTROP, *PHILOSOPHICAL ANTHROPOLOGY AND PRACTICAL POLITICS*, part I (1960).

or whole the causal effects of such beliefs. The class of such facts is what we referred to above as "second-order facts." Hence, "second-order facts" are empirical facts of human conduct which are in part or whole the causal effect of the freely-assented-to propositional beliefs of the person, or people or their official legal and political representatives, who indulge in the conduct.

The question now arises: What is the criterion for determining when it is correct in *sein-sollen* sentences to say that such second-order factual human conduct is morally good and legally just or morally bad and legally unjust? If our thesis that *sein-sollen* sentences are cognitive is meaningful, then this criterion, as we showed above, must be an empirical one. This means that it must refer to nonnormative empirical facts. Otherwise we would both beg the question and fall into the self-contradictory notion of *faits normatifs*.

The answer to this crucial question becomes evident when one asks the further question: What other facts than second-order facts are there? Our answer is "first-order facts," where by such nonnormative first-order facts we mean all those facts about oneself and the rest of the natural universe which are not causal effects of the beliefs of people. Our empirical criterion, therefore, of when it is correct to predicate the *sollen* words "ought," "good" and "legally just" of second-order facts is the following: That second-order factual human conduct is personally good and legally just in the sense of what ought to be, when this second-order factual conduct is the causal effect of that freely-assented-to propositional belief about first-order factual man and nature, which is empirically confirmed to be more probably true than alternative theories. That second-order factual human conduct is personally bad, legally unjust and not what ought to be, to the extent that it is the causal effect of freely-assented-to propositional beliefs in nonnormative psychology and natural science which, when put to an empirical test cognitively, are not confirmed with a higher degree of probability than any alternative theory. Of two such theories, to say that one is empirically confirmed with a higher degree of probability than another is equivalent to saying that the more probable theory entails all the empirical facts entailed by the less probable theory and at least one directly inspectable empirical fact which should not be present were the less probable theory true.

It remains to indicate (1) the conception of the judicial review of majority-approved legislative statutes and (2) the relation between law and morals that this theory entails. Since, according to this theory, there is no meaning to any normative word, be it moral or legal, except as it refers to second-order factual human conduct which is the causal effect in whole or part of the freely-assented-to beliefs of the individual person being morally and legally judged, it follows that any legislative statute which in its substantive content makes it a crime for a person to freely entertain and assent to one or another religious or secular belief, by making the holding of one of them a crime, is self-contradictory. In short, given the *sein* fact without which a normative word is meaningless, the principle of religious and civil liberties is analytic and hence tautologically true. We conclude, therefore, that Kelsen, H. L. A. Hart and

other moral, legal and cultural relativists are in error when they affirm that all the rules of any possible morals and law are hypothetical imperatives, relative to the particular legal system, culture or person in question. At this point we agree with Kant when he affirms that there is at least one categorical imperative and with Felix Cohen and Lon Fuller (in the latter's exchange with Professor Hart)⁴⁷ in their thesis that it is legally, as well as morally, meaningful to say that the substantive content of the *sollen* sentences of the positive law of any legal system is unjust. These sentences are unjust if they violate the freedom of assent of the individual to his own propositional beliefs without which any normative word, be it moral or legal, is meaningless.

But the right to entertain and freely assent to propositional beliefs is not the only analytically true categorical imperative. For the expression "propositional belief" is as essential to the *sein* cognitive reference and meaning of any moral or legal word as is the expression "freely assented to." This tells us that even though the principle of religious and civil liberties is a necessary condition, it is not a sufficient one for judging any person's or any positive legal system's second-order factual conduct and content to be morally good or legally just; what is assented to or written into the substantive content of the First Constitution is equally important. It tells us, in other words, what Justice Holmes with his notion of "clear and present danger" and other liberal democrats have had to recognize—the *sein* fact, namely, that even though the principle of religious and civil liberties is a categorical imperative, it is not absolute.

The reason, however, is not the *a posteriori* one given by Holmes, and by Kant in his *Philosophy of Law* when he said that no legal system can allow itself to be destroyed, since no *a posteriori* fact can upset a categorical imperative, as Kant should have remembered from his earlier works. Also, if, as our theory entails, no "ought" word is meaningful unless the propositional belief to which one freely assents is empirically or analytically verifiable, then any positive legal system, the substantive content of whose First Constitution expresses a propositional belief which can be shown on either analytic or empirical grounds to be cognitively false, ought to be destroyed by even its own people when they find this to be the case. The reason why the principle of religious and civil liberties is not absolute is, therefore, that there is another analytically true categorical imperative as well—the categorical imperative that we ought to assent only to propositional beliefs which can be shown on either analytical or empirical grounds by appeal to first-order facts to be true or more probably true, in the sense indicated earlier, than any alternative theory.

Elsewhere,⁴⁸ reasons have been given for believing that "law of Contract" legal systems, to the extent that their language is that of constructs, entail another analytically true categorical imperative. Moreover, although analytically

47. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

48. NORTROP, *op. cit. supra* note 6, ch. 22; and *op. cit. supra* note 15, ch. 19.

true rather than a synthetic *a priori* proposition, it is identical with the categorical imperative of Kant, discussed previously, when it is stated without the ambiguities of ordinary language. Stated with contemporary analytic logically realistic precision, this gives the following criterion of when any person's behavior or any political system's statutes are good and just :

- (1) (p) (x) :: x is intrinsically just : = : x is an instance of a syntactically constructed logically realistic relation R such that :
- (i) (p) R,
and (ii) (p) s of R, where x is the behavior of p or the object
of any moral or legal judgment and s is the substantive
content of R.

Expressed in ordinary language, interpreted logically realistically, this analytic expression is :

For *any one* person p and *any one* object of moral and legal judgment x, to say that x is intrinsically good and just is equivalent to saying that x instances a law R which is such that (i) R is universally quantified for all persons and (ii) the substantive content of R is also universally quantified for all persons.

Item (ii) is very important. It means that for any constitutional or legislative statute to be just, it is not enough, or even necessary, for it to be approved by the majority. Instead, justice means that if the statute in its substantive content assigns certain rights or obligations to one person p, or one class of people, oc, in the legal system, then *any one* must be substitutable for that person p, or the class of people oc, with respect to those rights and duties. Although defined completely formally without reference to sensed properties, this logical realistic theory of cosmopolitan morals, law and religion is by no means empty. In fact, it is the only theory, of which the writer's extensive reading has made him aware, that warrants the unanimous decisions of the Justices of the Supreme Court of the United States in the desegregation cases when, as is the case, there is no federal congressional statute making it a crime for any state to have its segregated cultural customs and their corresponding positive segregative legislative educational statutes.

It can be shown also that all three analytically true categorical moral and legal imperatives were affirmed by the Greek and Roman Stoic mathematical physicists, lawyers and moral and religious philosophers and that the resulting "movement from Status to Contract," which is the history of the evolution of Western law—a movement now, thanks to the American Declaration of Independence, embracing the world—is the working out of these three categorical imperatives in history. More specifically, it can be shown that (1) Jefferson read the Greek and Roman Stoic political, moral and legal classics; (2) these Stoic imperatives passed via Bracton into Coke to give rise to what Coke called "Fundamental Law" and, because of its technical legal constructs, what the British today call "lawyer's law" and regard as superior to the statutory law which expresses the approvals of the majority in the legislature; (3)

the first legal book which the English lawyer Wythe at Williamsburg made Jefferson study sentence by sentence, so that he mastered every legal construct in its imageless technical, normative legal meaning, was Coke's *Commentary on Littleton on Tenures*. Hence, (4) both directly by his reading of the Stoic Roman lawyers and moral philosophers and indirectly by way of Bracton, Littleton and Coke these three analytically true, categorical imperatives passed to Jefferson to be expressed (a) in their cosmopolitan (p) international legal implications in the American Declaration of Independence, which he wrote,⁴⁹ and (b) in their implications for religious and civil liberties in the Bill of Rights *interpreted as law* upon which he insisted.⁵⁰ (5) Items (3) and (4) help us also to understand what Jefferson meant when, later in his life, he expressed regret at the direction which American legal thinking and education were taking because lawyers were studying that woolly-worded fellow, Blackstone, instead of Coke and Bracton.⁵¹

Not only were the three technical analytic reasons why the Bill of Rights, in its non-*a posteriori* part, is to be interpreted by the judges as law being lost, to be replaced by Blackstone's quite different woolly-worded theory of natural law which enable one to read any *a posteriori* content which one pleased into the meaning of this expression, but also the skill of the legal craftsman as a technical "lawyer's lawyer" construct-maker was being lost, never, as we now know, to be fully recovered. Certainly Austinian legal positivism with nothing but its concepts by intuition and their radically empirical reference to equally fuzzy introspected pleasures and arbitrary preferences did not help matters other than to commit the additional error of confusing these equally fuzzy *a posteriori* pleasures of the majority in the legislature with an *a priori* categorical imperative.

Precisely because (1) all these confusions exist in the law that empirically is, and because (2) law is not merely our cognitively analytic categorical imperative prescribing what it ought-to-be, but also a "movement" towards this ought-to-be, the American legal realists' realization that one must study its *sein* as well its *sollen*, if one is to know what morals, law and religion are about, is correct. For the reader who is interested in obtaining a clue as to how the American legal realists' empirical methods, particularly those of the sociological and comparative anthropological jurists, are to be applied to the legal movement from the *sein* to the *sollen*, so that moral, legal, political and religious anarchy and atomic annihilation are not the result, the writer's *Philosophical Anthropology and Practical Politics* may be of some relevance.

49. NORTHROP, *op. cit. supra* note 6, ch. 22.

50. Jefferson wrote to Madison on March 15, 1789, as follows: "In the arguments in favor of a declaration of rights . . . one which has great weight with me [is] the *legal* check which it puts into the hands of the judiciary." (Italics added). JEFFERSON, *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 462 (Koch & Peden ed. 1944).

51. *Id.* at 726.

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